



**MINUTES**  
**FRIDAY – SEPTEMBER 27, 2002**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:04 a.m., on Friday, September 27, 2002, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Susan Kirby Brooke, David Fishbaugh, Kim Lacey, and Russ Hudson

Board Members Absent: Dr. Garon Smith and Ward Shanahan

Board Attorneys Present: Tom Bowe and Kelly O'Sullivan, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher for Hendrickson's Court Reporting

Department Personnel Present: Jan Sensibaugh, Director; Tom Livers, Deputy Director; Tom Ellerhoff, Administrative Officer, Director's Office (DIR); Lisa Peterson, Public Affairs Coordinator, DIR; John North, Chief Legal Counsel, Legal Unit (Legal), DIR; David Rusoff, Legal, DIR; Claudia Massman, Legal, DIR; Jim Madden, Legal, DIR; Keith Christie, Legal, DIR; Jolyn Eggart, Legal, DIR; John Arrigo, Administrator, Enforcement Division (ED); Steve Welch, Administrator, Permitting and Compliance Division (PCD); Judy Hanson, PCD; Don Vidrine, Chief, Air & Waste Management Bureau (AWMB), PCD; Dave Klemp, Air Quality Permitting Program Manager, AWMB, PCD; Charles Homer, Technical Support Section Manager, AWMB, PCD; Bonnie Lovelace, Chief, Water Protection Bureau (WPB), PCD; Brian Heckenberger, WPB, PCD; Jon Dilliard, Chief, Community Services Bureau (CSB), PCD; Debra Wolfe, Resource Protection Bureau (RPB), Planning, Prevention & Assistance Division (PPAD); Abe Horpestad, RPB, PPAD; Christian Levine, RPB, PPAD; J.D. Oster, DEQ Consultant

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Kevin Harvey, Montana Coal Bed Methane Natural Gas Alliance; Dana Hupp, Fidelity Exploration; Don Allen, Western Environmental Trade Association (WETA); John Metropolis, Fidelity Exploration; Mike Murphy, MWRA; Julie DalSoglio, US EPA; Anne Hedges, MEIC; K.D. Feeback, GSJW/Sterling; Terry Webster, Continental Energy; Kim Wilson, MEIC

Chairman Russell briefly explained how the agenda would flow, in light of the hearing on EC and SAR.

I. ADMINISTRATIVE ITEMS

A. Review and Approve Minutes of June 7, 2002, Meeting.

Ms. Kim Lacey MOVED to APPROVE the minutes of the July 26, 2002, meeting. Mr. Russ Hudson SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

## II. BRIEFING ITEMS

### A. Contested Case Update

#### 1. Cases Assigned to Hearing Officer Kelly O'Sullivan

##### a. Town of Geraldine

Ms. Kelly O'Sullivan, Board Attorney, explained that this case is still in a holding pattern, awaiting the outcome of rules, and that it has been continued to December 31.

## III. ACTION AGENDA ITEMS

### B. Repeal, Amendment or Adoption of Final Rules

#### 1. In the matter of the amendment of ARM 17.8.505, 17.8.510 and 17.8.514 pertaining to air quality operation fees, annual review of air quality permit fees, and open burning fees.

Mr. Charles Homer, DEQ, explained that the Board had authorized this action for initiation, that a hearing had taken place, and that the hearings officer should have a report for the Board.

Mr. Bowe explained that there were no public comments and that DEQ recommends adoption of the proposed amendments.

Discussion commenced about a document from PPL, which was included in the Board members' supplemental packets, but which neither Mr. Bowe nor Mr. Homer had seen. Mr. Bowe clarified that there were no oral comments received at the hearing.

Mr. David Fishbaugh MOVED to AMEND the rules. Ms. Susan Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

### C. Initiation of Rulemaking and Appointment of Hearing Officer

#### 1. In the matter of the amendment of DEQ Circular WQB-7 to include a human health standard for Bromoxynil and ARM Title 17, Chapter 30, Subchapters 502, 619, 702, 715, 1001, 1006 and 1007, which refer to WQB-7.

Mr. Christian Levine, DEQ, explained what Bromoxynil is and discussed its various uses. He further explained the reasoning behind this rulemaking. Mr. Levine explained how the DEQ ended up with the standard proposed.

Discussion commenced regarding whether this amendment was actually necessary. Mr. Levine advised the Board that Bromoxynil was a probable carcinogen, and therefore it would be a good idea to set a standard for remediation and other ground water monitoring. He further clarified that it is a registered chemical with restricted use.

Mr. Bowe stated he would be available to hold the hearing on November 19.

Ms. Brooke MOVED to INITIATE the rulemaking and to APPOINT Mr. Bowe as hearing officer. Mr. Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

#### 2. In the matter of the adoption of new rules I through X pertaining to storm water discharges.

Ms. Bonnie Lovelace, DEQ, explained that the rules are intended to capture the entire storm water program and are primarily a recodification of what the program is already doing. She further stated that new items included new permits for municipal storm sewer system

separation and explained how those are different from the current permits. Other new items included lowering the threshold for construction permits, which is a new Federal requirement, and an industrial no-exposure certification. Ms. Lovelace advised the Board that a few minor typographical errors, pointed out by Mr. Bowe in his comments on the rule package, were going to be corrected in the actual notice if it goes forward.

Discussion commenced regarding the threshold of acreage on construction sites and the number of permits that may be required in a month's time and how the DEQ might handle the load. Also discussed was use of the population cut-off with respect to the Federal regulations. Dialogue included monitoring issues and best management practices.

Mr. Bowe informed the Board that this rulemaking was directly related to the next agenda item. With Chairman Russell's approval, Ms. Lovelace proceeded to address the next agenda item.

3. In the matter of the amendment of ARM 17.30.1301, 17.30.1303, 17.30.1304, 17.30.1322, 17.30.1323, 17.30.1341, 17.30.1351, 17.30.1361 and the repeal of ARM 17.30.1332 pertaining to Montana Pollutant Discharge Elimination System Permits.

Ms. Lovelace explained that this rulemaking is a companion of the previous rulemaking and a further editing of the regulations. She provided details of what the editing entailed.

Mr. Bowe stated that both his calendar and DEQ's would tentatively allow for a November 18 hearing on both III.C.2 and III.C.3, at the same time.

Chairman Russell called for a motion to INITIATE rulemaking as part of the MPDES program's New Rules I through X, and the repeal of ARM 17.36.901 through 17.36.910, and to APPOINT Mr. Bowe as the hearing officer. Mr. Hudson so MOVED. Ms. Lacey SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

4. In the matter of the adoption of new rules I through IX and the repeal of ARM 17.36.901 through 17.36.910 pertaining to Subsurface Wastewater Treatment Systems.

Ms. Lovelace, on behalf of DEQ, explained that this package is a completion of a full re-write and modernization of the subdivision-related and subsurface wastewater regulations of the state. She stated that the purpose of these regulations is for local government use. Ms. Lovelace further advised that this includes an update of DEQ-4.

Mr. Bowe informed the Board that this rulemaking was directly related to the next agenda item. He further advised that if the Board were to initiate the rulemaking, a hearing would be held for both III.C.4 and III.C.5 at the same time.

5. In the matter of the amendment of ARM 17.38.101 and 17.38.106 to incorporate the 2002 version of Circular DEQ-4 (standards for on-site subsurface wastewater systems) and to replace outdated references to "WQB" with "DEQ."

Mr. Jon Dilliard, on behalf of DEQ, explained that the proposal in this rulemaking is to have the DEQ-4 incorporated into the public water supply regulations. This would ensure consistency within DEQ on reviews of subsurface drainfield systems and review fees.

Chairman Russell called for a motion. Ms. Lacey MOVED to INITIATE rulemaking for both III.C.4 and III.C.5 and to APPOINT Mr. Bowe as the hearing officer. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

9:47 A.M. – BREAK FOR HEARING

12:50 P.M. - RECONVENE

## II. BRIEFING AGENDA ITEMS

### A. Contested Case Update

#### 2. Cases Assigned to Hearing Officer Tom Bowe

- a. In the matter of M&W Investments, Inc.'s (EQ # 02-2146) appeal of DEQ's denial of the request for revision of a previous subdivision approval.

Mr. Bowe informed the Board that the agenda covered this item fairly well, that the parties stipulated to dismissal with prejudice, and that an order for dismissal will be presented as an action item.

- b. In the matter of M&W Investments, Inc.'s (EQ # 01-1457 and # 00-1822) appeal of two subdivision application non-degradation decisions and a deviation request denial.

Mr. Bowe reiterated the information provided in the agenda.

- c. In the matter of Van Dyke Construction Company, Inc.'s and Loughmiller Reclamation, L.L.C.'s (BER 2002-07 OC) request for a hearing to appeal a DEQ proposed civil penalty under the Open Cut Mining Act.

Mr. Bowe advised that the schedule in this case had been adjusted a little bit and that the hearing is set for December 31, 2002. He further explained that this case is somewhat complex and that the December hearing date might not hold.

- d. In the matter of Big Bend Ranch Development Company's (BER 2002-08 SUB) request for a hearing to appeal DEQ's denial of a subdivision approval.

Mr. Bowe advised that this case is right on track, with a hearing scheduled for November 6, 2002.

- e. In the matter of CR Kendall Corporation's (BER 2002-09 MM) request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act.

Mr. Bowe explained that DEQ and CR Kendall had requested to have until the end of September to submit a proposed schedule and that he had granted the request.

- f. In the matter of Sterling Mining Company's (BER 2002-01 AQ) Air Quality Permit #2414-01 is a petition by the Montana Environmental Information Center and others challenging the permit.

Mr. Bowe explained to the Board that this case includes some business in the action agenda items section and that he had made several rulings on motions in this case.

- g. In the matter of Westmoreland Resources, Inc.'s (BER 2002-04 MSUMRA) request for a contested case hearing under the Strip and Underground Mine Reclamation Act.

Mr. Bowe reported there had been no change in the status of this case.

- h. In the matter of Vicky A. Randolph's (BER 2002-05 SUB) request for a hearing under the Sanitation in Subdivisions Act to appeal an amended administrative compliance order, issued by DEQ, pertaining to the Randolph Manor Subdivision in Hill County.

Mr. Bowe advised that counsel stipulated to a dismissal without prejudice and that it will be presented as an action item.

Ms. Lacey referred back to the previous agenda item, Westmoreland Resources, and explained she needed to recuse herself in that case. It was clarified that if the Board at some point needs to take action on that case, it would be then that Ms. Lacey would need to recuse herself.

### III. ACTION AGENDA ITEMS

#### A. Action on Appeals

##### 1. In the matter of Vicky A. Randolph (BER 2002-05 SUB).

Mr. Bowe explained that an order for dismissal without prejudice was included in the Board packet.

Chairman Russell called for a motion to ACCEPT the hearing examiner's recommendation and to authorize the Board Chair to SIGN the order dismissing the case. Ms. Brooke so MOVED. Ms. Lacey SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

##### 2. In the matter of M&W Investments, Inc. (EQ # 02-2146).

Mr. Bowe advised that the parties did a written stipulation, which was included in the Board packet, that an order for dismissal was included in the packet, and that he recommends the matter be dismissed with prejudice.

Chairman Russell called for a motion to DISMISS the case with prejudice, as recommended by the hearing examiner, and to authorize the Chair to SIGN the order. Mr. Hudson so MOVED. Ms. Brooke SECONDED the motion. A VOTE was cast and the motion CARRIED unanimously.

*III.B.1 [REOPENED]* In the matter of the amendment of ARM 17.8.505, 17.8.510, and 17.8.514 pertaining to air quality operation fees, annual review of air quality permit fees, and open burning fees.

Mr. Bowe explained that there had been a comment letter from PPL that had apparently been misrouted. Mr. Livers explained this was the letter Mr. Hudson had found in his supplemental packet and that it had now been incorporated into the comments and the response.

After further clarification from Mr. Bowe, Chairman Russell called for a motion to APPROVE the notice of amendment provided by DEQ to be incorporated into the rule amendment. Mr. Fishbaugh so MOVED. Ms. Brooke SECONDED the motion. A brief discussion was held. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

*1:00 p.m. – 1:37 p.m. Lunch Break*

##### 3. In the matter of Sterling Mining Company's Air Quality Permit # 2414-01 (BER 2002-01 AQ) – MEPA Claim.

Mr. Bowe advised the Board that his proposed decision with a discussion of the MEPA issue was included in the Board packet. He explained that his recommendation was that the Petitioner's MEPA claim be dismissed without prejudice and continued discussion on the issue.

Mr. David Rusoff, attorney for DEQ, explained that the Department had filed the motion to dismiss for lack of subject matter jurisdiction. He further explained that if the Petitioners wanted to pursue the MEPA claim, they would need to do so in District Court.

Further discussion commenced regarding this issue having been before the Board in previous cases. Also discussed was previous legislation on MEPA.

Mr. Kim Wilson, attorney for the Petitioners, explained that the Petitioners disagree with the proposed ruling, but did not file exceptions to it. He provided reasoning for the disagreement, as well as for the decision to not file exceptions.

After further brief discussion on the issue, Chairman Russell called for a motion to ACCEPT the Hearing Examiner's recommendation and to authorize the Chair to SIGN the order to dismiss the MEPA claim without prejudice. Mr. Hudson so MOVED. Ms. Lacey SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

4. In the matter of Sterling Mining Company's Air Quality Permit # 2414-01 (BER 2002-01 AQ) – Constitutional Claim.

Mr. Bowe explained that both parties stipulated to dismissal without prejudice of the constitutional claim, therefore, he recommends the same.

Chairman Russell called for a motion to ACCEPT the hearing examiners recommendation and to authorize the Chair to SIGN the order dismissing the constitutional claim without prejudice. Mr. Hudson so MOVED. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

5. In the matter of Sterling Mining Company's Air Quality Permit # 2414-01 (BER 2002-01 AQ) – Petitioner's Motion for Summary Judgment.

Mr. Bowe explained that after he issued his proposed decision, the Petitioners filed a motion to dismiss without prejudice their Clean Air Act claims pertaining to the Wilderness Adit and the Service Adit. He also explained that, in his proposed decision, he had said there were issues of fact; therefore, summary judgment was not appropriate.

Mr. Wilson explained that their thought was that the Board could either disagree with Mr. Bowe and grant their summary judgment or agree with Mr. Bowe and grant summary judgment to the state. He further stated that they believed that the Board could dispose of the matter entirely on this day.

Mr. Wilson commended Mr. Bowe on his findings of fact and conclusions of law, and then proceeded to address some of the particulars of it. He stated that they initially argued, and still do, that the Rock Creek Mine is subject to the PSD rules. He further stated that DEQ argued that the PSD rules did not apply and that because of their different interpretation of baseline area, Rock Creek is a minor source and does not trigger the increment analysis.

Mr. Wilson explained their filing of exceptions, one being that DEQ's interpretation of its own rule is wrong and the second being that the EPA's interpretation of the rule, not DEQ's interpretation, was entitled to deference. He advised that the Board should defer to the EPA interpretation and provided reasons for such.

Mr. Wilson again stated the Petitioners believed the Board should grant them summary judgment, but if the Board were to deny the Petitioners summary judgment, they should grant summary judgment to the state and dispose of the case. He also stated they did

not believe there are issues of fact in this case. He pointed out a portion of Mr. Bowe's order and stated that they believed this was a question of law.

Mr. Hudson inquired about whether the Montnor Mine's decision to abandon their project influenced this in any way. Mr. Wilson addressed the question by stating that the Petitioner's position was that the permit of that mine was still valid. Mr. Hudson then reworded his question to ask that if that permit had been cancelled, would it then have any effect on their position. Mr. Wilson answered negatively, stating that there may have been other facilities that might have influenced the analysis.

Mr. Rusoff addressed the Board by first speaking to Mr. Hudson's question of Mr. Wilson. He stated that the EIS indicates that DEQ analyzed the SO<sub>2</sub> and NO<sub>2</sub> emissions against the PSD increments that would apply if the Rock Creek Mine project were to be located in a PSD baseline area and that no cumulative emissions with the Montnor Mine would be expected. Mr. Rusoff further explained that for facilities that have not operated for years or have not yet been developed, there are no actual emissions to use for modeling of a new facility.

Mr. Rusoff declared that since DEQ did an increment-like analysis of the proposed emissions from the Rock Creek Mine, and that there were no other actual emissions in the area, a more than adequate analysis was done. He further explained the reason the analysis was done and that DEQ's position is that the PSD rule does not apply.

Mr. Rusoff explained that the Petitioner's have the burden of proof in the motion for summary judgment and that they had failed to meet that burden. He stated DEQ feels strongly that there are issues of fact and continued discussion on the issue. Mr. Rusoff advised the Board that his recommendation would be to deny summary judgment to the Petitioners and to not consider granting summary judgment to DEQ, thus allowing the case to proceed to a contested case hearing. He also made known that DEQ had not filed a motion for summary judgment.

Further discussion was held regarding the PSD issue and the possibilities if the Rock Creek Mine was in a PSD baseline area. Mr. Rusoff provided four key points as to why motion for summary judgment should not be granted. He provided further explanation of the differing interpretations of a PSD baseline area. Mr. Rusoff rebutted a number of arguments made in the Petitioner's exceptions.

Mr. Bowe asked for clarification of a letter Mr. Rusoff sent to the Petitioners concerning a scheduling problem. Mr. Rusoff explained that a primary witness for DEQ had a baby recently and is on maternity leave until January 2. He further requested that an accommodation be made to the extent possible in regard to scheduling a hearing.

Mr. Hudson inquired about the Petitioner's request to remand the permit back to DEQ for corrections and to award the Petitioners their costs and attorney fees. Mr. Rusoff explained that administrative agencies do not have authority to award attorney fees or costs. Mr. Bowe concurred with Mr. Rusoff.

Mr. Wilson responded to Mr. Rusoff's and Mr. Bowe's statements by referring to the Private Attorney General Theory and further stating that he routinely used the language and left it in this time because of what they feel they are looking at down the road. Further details were provided regarding the Private Attorney General Theory, under which a court may allow private persons or groups to recover attorney fees when they prevail as a plaintiff in cases vindicating strong public policies, such as protection of constitutional rights.

Mr. Wilson requested the opportunity to respond to some of the points raised by Mr. Rusoff. Chairman Russell granted the request. Mr. Wilson had a differing opinion of whether actual or potential emissions were to be used for modeling. He argued that DEQ had previously stated that no documents existed in regard to an analysis of other facilities. He pointed out that the Board did indeed have authority to grant summary judgment to DEQ even though DEQ had not filed a motion for such. Mr. Wilson concluded his argument by stating they believed it would be another six months before the case would go through a contested case hearing, and they believed that this would be an unnecessary expenditure of time and resources.

Chairman Russell and Mr. Bowe engaged conversation regarding clarification of what a summary judgment actually is. Mr. Bowe explained the complexities of the case, including the fact that different governments are interpreting exactly the same language in different manners. He advised the Board that the Petitioners had made a legal argument that had merit and although he disagreed with it, it was a rational legal argument. He further pointed out that if the argument was right, then DEQ had been wrong for nine years. Mr. Bowe suggested that at some point this issue might come up in other appeals. He clarified that the decision he issued agreed with DEQ's interpretation, that DEQ had consistently interpreted it that way, and that DEQ had the discretion to interpret it that way. Mr. Bowe reiterated that it was an issue that would continue to come up.

Chairman Russell again asked for clarity on the procedure for the Board's decision. Mr. Bowe restated his recommendation to deny the Petitioner's motion for summary judgment; thereby the case would go forward. He also explained the various options the Board had.

Mr. Hudson MOVED to ACCEPT Mr. Bowe's recommendation to DENY summary judgment and that the case go forward as a contested case hearing. Ms. Brooke SECONDED the motion. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Chairman Russell offered his thoughts on the earlier request of Mr. Rusoff to accommodate the maternity leave schedule of a DEQ key witness, stating that it was a long time to wait.

Discussion was held regarding the Petitioner's motion to dismiss the adit claims. Mr. Wilson clarified that the motion had been filed to "clear the board" in the case that the Board granted summary judgment, but that since the Board denied summary judgment they would like to withdraw their motion to dismiss the adit claims. Mr. Rusoff stated that DEQ had no objections to withdrawing the motion.

#### D. New Contested Cases

1. Derek Brown Construction, Inc.'s (BER 2002-10 ASB) appeal of a notice of violation and an administrative penalty order (#ASB-02-03), for asbestos violations, issued by DEQ.

Mr. Bowe explained the nature of the appeal and stated that he had issued the first prehearing order, which requested a proposed schedule from counsel for the parties. He advised that he had not received a proposed schedule yet, but that he believed it would be manageable for him to be the permanent hearing examiner in this case.

Chairman Russell called for a motion to APPOINT Mr. Bowe as the hearing examiner. Ms. Lacey so MOVED. Mr. Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.



2. In the matter of Kwik Way, Inc.'s (BER 2002-11 UST) appeal of three notice of violation and administrative penalty orders (#UST-02-07, UST-02-08, and UST-02-09) issued by DEQ under the Montana Underground Storage Tank Act and administrative rules adopted there under, for failure to have inspections completed by the statutory deadlines.

Mr. Bowe explained that he had issued the first prehearing order asking the parties to propose a schedule, but he had not yet received one. He further stated that since there was no proposed schedule to look at, he believed his schedule could manage it.

Chairman Russell called for a motion to APPOINT Mr. Bowe as the permanent hearing examiner. Mr. Hudson so MOVED. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

III.C.2 & III.C.3 Chairman Russell pointed out an error he had made when he called for the motion. He had cited the wrong rules. To clear the matter up for the record, Mr. Bowe advised that the Board should affirm what they actually thought they were doing, that was to initiate rulemaking on items III.C.2 and III.C.3.

Chairman Russell called for the motion. Ms. Brooke so MOVED. Ms. Lacey SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

#### IV. ADJOURNMENT

Chairman Russell called for a motion to ADJOURN. Mr. Fishbaugh so MOVED. Ms. Lacey SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously. The meeting adjourned at 3:11 p.m.

Board of Environmental Review September 27, 2002, Minutes Approved:

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JAN P. SENSIBAUGH  
DIRECTOR  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY

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JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL  
REVIEW

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DATE

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DATE